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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO AND OUACHITA LOCAL 654,
Petitioners

v.

MISCO, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

DAVID E. FELLER *
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720
(415) 642-0629

WILLIAM P. MURPHY
President, National Academy of Arbitrators
School of Law
University of North Carolina
Chapel Hill, North Carolina 27514
(919) 962-4124

Attorneys for the National Academy of Arbitrators

Of Counsel:

JAN VETTER
Boalt Hall
Berkeley, CA 94720
(415) 642-0821

* Counsel of Record

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BRIEF OF THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST AND CONCERN OF THE AMICUS

The National Academy of Arbitrators was founded in September 1947. Its membership is limited to those who have substantial and current experience as impartial arbitrators of labor-management disputes so as to reflect general acceptability by the parties, or those with limited but current experience in arbitration who have attained

general recognition through scholarly publication or other activities as impartial authorities on labor-management relationships. Its principle purposes are "to establish and foster high standards and competence among those engaged in the arbitration of labor-management disputes on a professional basis; to adopt canons of ethics to govern the conduct of arbitrators; to promote the study and understanding of the arbitration of labor-management disputes." It is co-author, with the American Arbitration Association and the Federal Mediation and Conciliation Service, of the Code of Professional Responsibility for arbitrators of Labor-Management Disputes. As of September 1985 the membership of the Academy totalled approximately 637. The annual meetings of the Academy are the occasion for the presentation of papers by scholars, arbitrators and representatives of labor and management dealing with the nature of the arbitration process, its relationship to the law and the conduct of labor-management relationships in general. The proceedings of the annual meetings are published by the Bureau of National Affairs and constitute the most authoritative collection in existence of the materials on the arbitration process.

This is the second *amicus curiae* brief filed by the Academy in this Court. The first was in *A.T.&T. Technologies, Inc. v. Communications Workers of America*, October Term, 1985, No. 84-1913, decided April 7, 1986. As in that case the brief filed, with the consent of the parties, because the Academy believes that if the law is to be involved in the arbitration process, as Congress in effect mandated by enacting Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185), that involvement should serve to effectuate the purposes for which unions and employers have established that process. The course of this Court's decisions with respect to arbitration have, we believe, served that purpose. Because this case has the potential for disturbing the regime

established by the prior decisions of the Court, the Academy has undertaken to file this brief. The importance of the case is not the result for the particular parties involved. The importance, rather, is in the doctrine announced in the case as it affects the relationship between the courts and the arbitration process in the countless other cases which may follow in the future. It is our hope that this brief will assist the Court in understanding the context in which cases such as the present one arise and in announcing doctrine which will support rather than undermine a process that both unions and employers have found to be desirable.

SUMMARY OF ARGUMENT

In order to reach the conclusion that public policy dictated reversal of the arbitrator's decision ordering reinstatement in this case the court below first had to reverse both his interpretation of the collective bargaining agreement and his findings of fact, in violation of the principles set forth by this Court in *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). There was no evidence that the grievant had operated dangerous machinery under the influence of drugs or alcohol. The court could have concluded that the public policy against such operation required vacation of the arbitrator's award only by making a totally unwarranted substitution of its own belief or beliefs for the arbitrator's conclusion on the facts.

Even assuming that the court below was justified in so doing, and that the grievant had violated the rule against the use of marijuana on company property, the court should not have reversed on public policy grounds the arbitrator's order of reinstatement. Analysis of that question requires a description of the arbitrator's role in disciplinary cases. It is true that the arbitrator is authorized only to interpret and apply the express or implied provisions of the agreement. But where an agreement

provides for review of the discipline imposed by the employer, the arbitrator is usually given authority to decide whether the discipline imposed was "just."

The first issue in any discharge case is whether the discharged employee has committed the offense with which he has been charged. Unless the agreement otherwise provides, however, a finding of "guilty" does not end the matter. In the usual case, as in this case, the agreement provides that the employer's power to discipline or discharge may be exercised only for "just cause." And in the determination of that question, the arbitrator in the usual case is empowered to reduce the penalty and provide an appropriate remedy.

In determining the justice of the discipline imposed by an employer, as well as in prescribing the appropriate remedy where there is not, the arbitrator is authorized by the agreement to decide any questions of public policy relating to those issues. This is particularly true with respect to issues of public safety. Examination of arbitrators' decisions in disciplinary cases shows that arbitrators not only have the authority to rule on public policy questions in such cases but exercise it.

Since the parties have vested in the arbitrator the authority to consider public policy in determining whether there was "just cause," and in providing a remedy, the courts should not entertain claims of the losing party that the arbitrator has not made the appropriate judgment on the public policy issue unless the remedy prescribed by the arbitrator would require a violation of law. The arbitrator's decision is, as it were, read into the agreement as if it were set out in the agreement in so many words. A court should not refuse to enforce the agreement as so read unless enforcement would require a violation of law. The same principle may, but need not necessarily, be applied in other cases. Even in those other

cases, however, the rule announced by this Court in *W.R. Grace and Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983), should control, and the expansive use of public policy represented by the decision of the court below should not be permitted.

This result is dictated by the overriding federal policy expressed in the whole structure of law which this Court has built in the interest of encouraging the use of arbitration rather than the strike as a method of resolving disputes arising during the term of a collective bargaining agreement. The rule of *Enterprise Wheel and Car* is an essential part of that structure. As this case illustrates, there is a strong temptation for courts to reach out, on one ground or another, to set aside arbitration awards that they consider wrongly decided. That temptation is resisted in most cases. But the proliferation of litigation in which the validity of an arbitrator's award is challenged shows that even the few cases in which the challenge is successful serve as beacons encouraging litigation that, in the end, can only undercut achievement of the objectives of speed, flexibility, and finality that induce employers and unions to choose arbitration rather than the strike as the terminal facility for the resolution of disputes. This court should, therefore, in the strongest terms reaffirm the principles of finality expressed in *Enterprise Wheel and Car.*

ARGUMENT

I. Whether or Not a Court May Refuse to Enforce an Arbitrator's Award for Reasons of "Public Policy," the Decision Below Must Be Reversed

There can be little doubt about the proper end result in this case. Even assuming that the question posed in the petition for certiorari—"Whether a federal court may refuse to enforce an arbitration award [not in violation of law] . . . on the ground that enforcement of the award would contravene public policy. . . ."—is answered in the

affirmative, the decision of the Court of Appeals should be reversed.

The reason is simply that the Court of Appeals, although it purported to do so, plainly failed to adhere to the principles of *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The court said that its refusal to enforce the arbitrator's award ordering reinstatement was based on a public policy concern for safety. But no such question of public policy even presented itself unless the court first invaded the arbitrator's domain and reversed both his interpretation and application of the collective bargaining agreement and his findings of fact.

The arbitrator in this case is not a lawyer and his opinion in this case may not be a model of judicial craftsmanship. But as this Court has said, there is no requirement in law that an arbitrator issue any opinion and if one is issued "a mere ambiguity in the opinion accompanying the award . . . is not a reason for refusing to enforce the award." [1] In this case there is no ambiguity. Although not in the order one might desire, and with some unnecessary dictum, the opinion does show the ultimate finding upon which the arbitrator rested his award. He found that the evidence properly before him—consisting principally of the grievant's apprehension in the rear seat of a car not his own in which a lit marijuana cigarette was in the front seat ashtray after the two occupants of that front seat had departed—was not sufficient to prove the grievant guilty of the offense for which he was discharged: smoking marijuana. The fact that an unusable amount of marijuana residue was later found in the grievant's own car, a fact which was only discovered later and first adduced by the company at the time of the hearing, the arbitrator ruled to be irrelevant.

In so ruling the arbitrator followed the usual practice in arbitration. The general rule is stated by the leading

[1] 363 U.S. at 593.

commentators on arbitration practice: "Where a discharge occurs, its propriety must be determined from an analysis of the cause for the discharge, and evidence of misconduct discovered after the discharge cannot be presented to justify the discharge action." [2] Or, as stated in Elkouri & Elkouri,[3] "Even without . . . specific contractual provision, arbitrators have held that discharge, to use the words of arbitrator Paul N. Gunthrie, 'must stand or fall upon the reason given at the time of discharge;' other reasons may not be added when the case reaches arbitration." These authors also indicate that there are circumstances in which some arbitrators have taken into account post-discharge justifications based on evidence obtained after the discharge. But clearly the arbitrator was exercising the judgment which the parties had vested in him in determining that under this collective bargaining agreement evidence of a violation of the rule in question different from the one for which the grievant was discharged should not be taken into account in determining whether the employer had just cause when it discharged him.

Even if we assume that the court properly reversed the arbitrator for what it called a "narrow focus on [the grievant's] procedural rights," there still was no public policy question. If the arbitrator should have considered the after-discovered evidence of the marijuana gleanings in the grievant's car, then he could have concluded that the grievant had technically violated the rule against bringing a controlled substance onto plant premises. But even so, that would not call into play any public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." It simply dooes not follow from the fact that there were marijuana gleanings in the grievant's car that he had operated machinery under the influence of marijuana.

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[2] Fairweather, Practice and Procedure in Labor Arbitration (2nd ed. 1983) 303.

[3] How Arbitration Works (4th ed., 1985) 675-676.

This must have been apparent to the Court of Appeals. Perhaps the court reached the public policy question because it believed that the grievant had in fact been smoking the marijuana cigarette found in the front seat ash tray and that he therefore operated dangerous machinery under its influence. Perhaps the court believed that the grievant had supplied from his car the marijuana which his companions then smoked in the second car, thus causing *them* to operate dangerous machinery under the influence of marijuana. Perhaps it believed—as it intimated in its opinion—that sitting in a car in which others smoked marijuana caused the grievant to be under its influence.[4] Whichever is the case, the court had to invade the province of the arbitrator in order to reach the public policy issue. No safety question at all existed unless the court substituted its own beliefs, for the arbitrator's conclusions on the facts in violation of the direction of this Court in *Enterprise Wheel and Car.* As the Court there stated, it is the arbitrator's judgment which the parties have bargained for, and that judgment should be sustained unless it can be shown that the arbitrator attempted to dispense his own brand of industrial justice instead of applying the standards which he found in the collective bargaining agreement.

II. Under Agreements Providing for Review of the Imposition of Discipline on a "Just Cause" Standard the Arbitrator Is Authorized to Consider Questions of Industrial Justice

Although this case can be disposed on the foregoing basis, any such decision would not resolve the conflict of circuits that presumably led this Court to grant certiorari. We therefore now address ourselves to that question: to what extent and under what circumstances, may

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[4] If so, the belief is contrary to the scientific evidence. See Perez-Reyes, Guiseppi, Mason and Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids,* 34 Clinical Pharmacology and Therapeutics No. 1, p. 36 (1983).

a court set aside an arbitrator's award in a discharge case on the ground that enforcement would violate public policy? In order to do so we assume, hypothetically, that the arbitrator had properly found that the grievant had violated the company rule but nevertheless ordered his reinstatement, although there is no showing that he would have done so or, if he would, what conditions he might have placed on the reinstatement order.

Resolution of the question thus posed requires careful consideration of the respective roles of courts and arbitrators in actions subject to Section 301 of the Labor Management Relations Act of 1947. This Court in *A.T.&T. Technologies*[5] recently re-addressed one aspect of that relationship—the role of the court in determining whether an employer should be required to arbitrate a claim that the collective agreement has been violated. The question presented in this case concerns the role of the court at the end of the arbitration process when the award has been issued.

The two are closely related. In *Warrior & Gulf*[6] and *American Manufacturing*[7] this Court made it clear, and reiterated in *A.T.&T. Technologies*, that if the claim is that a party has violated the collective bargaining agreement and the arbitration provision is susceptible of a construction making a claim of violation of the agreement subject to arbitration the court should order the other party to arbitrate. It follows that when arbitration is ordered, or when the obligation to arbitrate is complied with without the necessity of an order, the arbitrator is confined to determination of the questions comprised within the agreement to arbitrate. In the typical

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[5] *A.T.&T. Technologies v. Communications Workers*, —— U.S. ——, 106 S.Ct. 1415 (1986).

[6] *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

[7] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

case, as in the present case, those questions are whether the employer has complied with the express or implied provisions of the collective bargaining agreement and, if not, what is the appropriate remedy. As this Court restated the arbitrator's role in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974), citing *Enterprise Wheel & Car*:

> "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties . . . . If an arbitratal decision is based 'solely on the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of his submission,' and the award will not be enforced."

What is true of a decision of an arbitrator based on the requirements of enacted legislation is equally true of one based on public policy. The general rule is that an arbitrator has no authority to award relief to a grievant that is not expressly or impliedly required by the collective agreement because the arbitrator believes it to be required by public policy or, on the other hand, to deny relief which he finds that the agreement mandates because of considerations of public policy. In so doing the arbitrator would be "dispensing his own brand of industrial justice."

As with all general rules, however, there are exceptions. The collective agreement may itself require the arbitrator to consider and decide "the requirements of enacted legislation." A typical example is an agreement provision that the employer will accord to returning servicemen all of the seniority rights specified in the ap-

plicable service legislation.[8] Another is a provision that the employer will abide by the nondiscrimination provisions of Title VII of the Civil Rights Act.[9]

The collective agreement may also, either expressly or impliedly, authorize the arbitrator to deal with questions of industrial justice. And, indeed, most agreements in fact do so in connection with discipline and discharge cases. Even those agreements that do specify grounds for discipline or discharge, either in the agreement itself or in rules which the agreement authorizes the employer to promulgate, rarely provide for automatic and uniform penalties. There are agreements that do. Some agreements, for example, provide for graduated penalties for specific numbers of unexcused absences or garnishments with discharge as the final and automatic penalty for a specified number in a given period.[10] Similarly, an agreement may provide that engaging in a strike in violation of the agreement is ground for discharge and that, if the penalty is contested, the arbitrator may only consider whether the disciplined employee in fact engaged in the prohibited conduct.[11]

The usual agreement, however, does not so provide but rather specifies that an employee may be discharged only for "just cause," or "proper cause" or "sufficient cause." And it is just in such cases that the conflict in the circuits which brought this case to the Court has arisen. The precise question upon which the courts of appeals have differed is whether, and under what circumstances,

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[8] Agreement between United States Steel Corp. and Steelworkers, Section 15A (exp. 8/86) reprinted in BNA, Collective Bargaining Negotiations and Contracts (hereinafter CBNC) 27:48.

[9] See the provisions reported in CBNC 95:482.

[10] See the provisions reported in CBNC 40:13 and 40:203.

[11] Agreement between Litton Industrial Products, Inc. and Machinists (exp. 6/83) reported in CBNC 77:277.

a court can refuse to enforce an arbitrator's decision that a discharge was not for "just cause" on the ground that the decision is contrary to public policy. More detailed analysis of the arbitrator's function in discharge cases is, we believe, the necessary predicate for resolution of that question.

As former dean Sanford Kadish argued in an address to the Academy in 1964, the issues in a disciplinary case are roughly analogous to those posed in criminal trials.[12] The first issue is whether there is satisfactory proof that the disciplined employee committed the offense for which he was discharged. This is a factual question on which arbitrators unanimously take the position that the employer has the burden of proof, although they differ as to the weight of that burden. In some cases arbitrators have said that proof in the case of a discharge must be beyond reasonable doubt, in others the standard is stated to be clear and convincing proof, in yet others it is said to be preponderance of the evidence.[13] In any event, if the arbitrator finds, on whatever basis, that the employer has not met its burden of proof, the discharge or discipline must be set aside and the employee made whole.

Once the arbitrator finds that the employee committed the offense for which he was disciplined, there are additional issues. Since the arbitrator's jurisdiction is that prescribed by the agreement, he must next decide whether the agreement, either explicitly or as consistently construed by the parties, provides a mandatory penalty or

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[12] Kadish, *The Criminal Law and Industrial Discipline As Sanctioning Systems*, in Labor Arbitration Perspectives and Problems, Proceedings of the Seventeenth Annual Meeting, National Academy of Arbitrators (1964) 125.

[13] See Jennings, Sheffield and Walters, *The Arbitration of Discharge Cases: A Forty-Year Perspective*, 38 Lab.L.J. 33, 39-40 (1987).

that the employer's determination as to penalty is unreviewable.[14] If so, the case is ended. But in the usual case, as in this case, the agreement provides that the employer's power to discipline or discharge may be exercised only for "just," or "proper" or "sufficient" cause.

The arbitrator's function under such an agreement was described in a decision 40 years ago by Harry Platt, an arbitrator who subsequently became president of the National Academy, in these words:

> "It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a question and therefore, perhaps the best he can do is to decide what a reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just." [15]

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[14] Although unnecessary to his ultimate decision that the grievant did not commit the offense charged, the arbitrator in this case addressed this question in his opinion. Referring to it as a question of whether Rule II.1 called for "immediate discharge" he concluded that it did not since that rule was included without differentiation with a rule prohibiting reading on duty, clearly not one requiring mandatory discharge. App.Pet.Cert. 45a.

[15] *Riley Stoker Corp.*, 7 LA 764, 767 (H. Platt, 1947).

In addressing these questions, the arbitrator is, of course, not making the initial determination. That right is given to the employer. The arbitrator's function is to decide whether in exercising that right the employer has satisfied the contractual standard. If the arbitrator determines that it has, the case is ended. If he determines that the employer has not, there remain further issues. The agreement may provide that the arbitrator has no authority to modify the discipline imposed. In that event the arbitrator cannot substitute his determination as to the appropriate punishment.[16] In the more usual case, however, the arbitrator is empowered to reduce the penalty if he concludes that the one imposed by the employer does not meet the contractual standard of justice or sufficiency. And that raises the third and final question: the appropriate remedy. Here again the factors described by arbitrator Platt are relevant. If the arbitrator determines that a discharge does not meet the standard of justice or sufficiency, he may reduce the penalty to a suspension for a specified number of days or order reinstatement without back pay, thus in effect imposing a suspension equal to the time elapsed between the discharge and the date of reinstatement, or impose conditions on reinstatement.

Thus in *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), the arbitrator's award that the court set aside had ordered in 1977 reinstatement without back pay of a truck driver who had been discharged in 1975, thus imposing a two year suspension without pay. In *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984), the arbitrator ordered reinstatement of a window clerk who had confessed to embezzlement and had been given probation by the court and ordered to make restitution. The reinstatement directed, however, was without

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[16] Agreement between United States Steel Corp. and Steelworkers, Section 8-D (exp. 8/86) reprinted in CBNC 27:16.

back pay and not to the grievant's former position but, rather, to one where "similar action" to that which had occurred "could not take place," with the additional condition that deductions be made from his pay to accomplish the restitution.

III. In Determining Whether Standards of Industrial Justice Have Been Met, Arbitrators Are Authorized to and Do Decide Questions of Public Policy and, in Particular, Public Policies Relating to Safety

Unless constrained by other provisions of the collective agreement an arbitrator who is directed by the parties to consider whether the discipline imposed by the employer is "just," or "proper" or "sufficient" necessarily must take into account any public policy relating to the justice of the discipline. As another past president of the Academy, Professor Edgar A. Jones, Jr. put it in an address to the Academy, considerations of justice create a "necessity for an arbitrator to assess 'the common stock of legal ideas' about what is tolerable in our society." [17] This is particularly true of the public policy issue presented in this case: safety.

A review of all published arbitrators' decisions conducted by Professor Alfred Blumrosen more than 25 years ago under the title "Public Policy Considerations in Labor Arbitration Cases" [18] demonstrated what clearly remains true today: arbitrators consider it their duty to take account of public policy considerations in determining "just cause." He found that arbitrators "handle public policy considerations with understanding and intelligence." [19] And a sampling of recent decisions dealing

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[17] Jones, *The Role of Arbitration in State and National Labor Policy*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators 42, 53 (1971).

[18] Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 Rutgers L.Rev. 217 (1960).

[19] *Id.* at 263.

with safety considerations where drug or alcohol abuse is alleged underlines his conclusion.

For example, in *Asarco, Inc.*, 76 LA 162 (H.H. Grooms, 1981), the arbitrator sustained the discharge of an employee because he entered the mine under the influence of alcohol, saying:

> "This arbitrator has no little appreciation of the risks attendant to underground mining, having decided over a hundred arbitrations arising out of that field. He has been to the face of a coal mine, 3,000 feet below the surface. He has observed miners carrying out their customary tasks. While he has not been down in a zinc sulfide mine, he cannot conceive of it being as safe as a package terminal, a warehouse, or an assemblyline. . . . It is a place where safety must continually be foremost in each employee's mind. It is a place where even a brief omission of basic mine safety can lead to serious injury or death not only of the employee involved but very likely others in the area." 76 LA at 165.

In *Cities Service Co.*, 77 LA 1180 (C.C. Brisco, 1982), another case of a discharge for reporting to work under the influence of alcohol, the arbitrator sustained the discharge, saying:

> ". . . . The Company's ore processing facility with its open tanks, moving machinery and metal grating walkways and stairs is full of hazards, especially for a person who is not fully in command of all of her faculties. There are ample reasons for enforcing a stringent rule against reporting for work under the influence of intoxicating liquor." 77 LA at 1184.

This is particularly true where the employment of the discharged employee required him to operate vehicles or otherwise create a hazard for the public. Thus in *Indianapolis Power and Light Co.*, 87 LA 826 (M.M. Volz, 1986), the arbitrator in sustaining the discharge of an employee for the use of drugs off the job, said:

> "In passing on the severity of the discharge penalty imposed, we observe that the Company is a public utility, the actions of which are under careful scrutiny by the public and by the regulatory agencies. The obligations to conduct safe operations and to have safety-minded employees are contractually imposed and cannot be compromised. Here the grievant did work with and in the vicinity of other employees; he operated Company vehicles, sometimes on public roads; he had notice of the Company's anti-drug policy and that the possible penalty could be termination." 87 LA at 830.

Again, in *Consolidation Coal, Co.* 87 LA 729 (R.Hon, 1986), the arbitrator sustained the discharge of an employee found to be working under the influence of drugs, saying:

> "possession and/or use of illegal drugs is generally regarded as an offense which constitutes such an 'industrial felony.' This is particularly true in the mining industry, where the operation of heavy machinery compounds the inherent hazards of the job. Working under such conditions requires full physical and mental capacity at all times to a higher degree than jobs with lesser safety considerations. . . . To condone grievant's actions in any way could lead other employees to believe that they can violate such a fundamental conduct rule, endanger the safety of other employees, and still retain their jobs. A coal mine, with its inherent dangers and hazards, is not a place where such conduct can be countenanced." 87 LA at 737.

Arbitral consideration of public policy in determining whether "just cause" for discharge exists is not confined to conduct on the plant premises. Although arbitrators will generally not sustain discipline based on conduct unconnected with a grievant's work, they do sustain discharges where off-duty conduct prevents the employer from fulfilling its public responsibilities. Thus, conviction of an employee of drug dealing totally unconnected

with the work place has been found to constitute "just cause" for discharge because of its effect on the employer's credibility in its effort to combat drug use in the workplace in the interests of safety.[20] Even in the absence of a criminal conviction a discharge has been sustained as just on the basis that a publicized arrest for possession of cocaine off the employer's premises would adversely affect the employee's ability to perform a public function.[21]

To be sure, arbitrators do not sustain discharges as "just" in every case in which the use of drugs or alcohol in violation of a management rule is found, even where there are serious safety considerations. Safety is not the only public policy consideration which an arbitrator may take into account in determining whether the standard of "just cause" has been met. Society has an interest in rehabilitation, an interest in preserving the opportunity of employees who have erred to continue as useful members of the working force, an interest in not relegating to the scrap heap those who have served long and well. These interests are particularly strong in a society where drug and alcohol dependence problems have become widespread. In recognition of this interest as well as of their own, many employers have established what have come to be called generically Employee Assistance Programs to deal with drug and alcohol abuse.[22] Indeed, the largest employer in the country, the government of the United States, has recently mandated the adoption of such programs. See Executive Order 12564, 51 F.Reg. 32839 (September 15, 1986), requiring each executive agency to establish a program emphasizing, among other things, "counseling, referral to rehabilitation, and coordination with available community resources."

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[20] *Lanter Co.*, 87 LA 1300 (J.R. Thornell, 1987).

[21] *Wayne State University*, 87 LA 953 (M. Lipson, 1986).

[22] The various approaches to drug and alcohol abuse problems are discussed in T.S. Denenberg and R.V. Denenberg, Alcohol and Drugs: Issues in the Work Place (1983).

Where such programs exist and the discharged employee has not been afforded an opportunity to participate, arbitrators may set aside discharges and direct the employer to make the services of the program available to the employee.[23] Even where there are no such programs, many arbitrators will, depending on the employee's record and his willingness to undertake rehabilitation, direct reinstatement following completion of a rehabilitation program on condition that the employee subject himself to appropriate testing to show that he is free of the offending substance.[24] In other situations, where there is no indication that the discharged employee will repeat the offense and his prior record is clean, arbitrators may order immediate reinstatement but on a probationary basis subject to automatic discharge for a second offense.[25] What arbitrators do in these situations is analogous to the function courts perform in determining whether a convicted offender shall be sent to prison or be put on probation subject to conditions designed to minimize potential dangers to the public.

To sum up, in discharge cases subject to a "just cause" provision the arbitrator's function is to determine whether, given all of the facts and circumstances which he finds in the case before him, there was just cause for the employer to impose the discipline involved and, if he finds that there was not, to order an appropriate remedy. In cases based on the use of drugs or alcohol consideration of both questions may involve consideration of whether there is a rehabilitation program, whether the employee has agreed to enter it or has been denied use of it,

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[23] See *Armstrong Rubber Co.*, 77 LA 775 (A.M. Koven, 1981); *Springfield Mass Transit District*, 80 LA 193 (V. Gunther, 1983); *Washington Metropolitan Area Transit Authority*, 82 LA 150 (H.N. Bernhardt, 1983).

[24] *Atchison, Topeka & Santa Fe Ry. Co.*, 87 LA 972 (J.R. Johnson, 1986); *Morgan Adhesives*, 87 LA 1039 (R.I. Abrams, 1986).

[25] *Signal Delivery Service, Inc.*, 86 LA 75 (E.M. Weis, 1985).

whether, on the evidence, there is any indication that the employee will repeat the offense and, finally, the hazard to the discharged employee, other employees, the employer or the public created by the employee's conduct. All of these factors arbitrators can and do take into consideration, in varying degrees, depending upon the particular circumstances. The parties have assigned that function to the arbitrator and have agreed that, as the chosen proctor of the bargain, his decision shall be final.

IV. A Court Should Not Set Aside an Arbitrator's Decision as to the Justice of Discipline on Public Policy Grounds Unless the Remedy Prescribed by the Arbitrator Would Require a Violation of Law

It is with this understanding of the arbitrator's function in disciplinary cases subject to a "just cause" standard that we now address the question of whether, and under what standards, a court should set aside awards in such cases in suits subject to Section 301.

We begin by restating the obvious. As former Dean St. Antoine has put it, "The arbitrator is the parties' officially designated 'reader' of the contract." [26] "The arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract." [27] Thus, when an arbitrator decides that an employee's discharge for violating a rule was not for "just cause" and orders reinstatement, with or without back pay and with or without conditions, it is just as if the parties had agreed in so many words that on the particular facts this was the prescribed remedy. It follows that a court asked to set aside the award should do so only if it finds that an

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[26] St, Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progency*, in Arbitration—1977, Proceedings of the Thirtieth Annual Meeting, National Academy of Arbitrators 29, 30 (1978).

[27] *Ibid.*

agreement prescribing that remedy is an unenforceable one.

If the parties' agreement, as so read, requires action that would violate a federal or state statute or regulation it is obviously uneforceable. In some cases a dispute as to whether the relief requested would violate the law is presented to the arbitrator. Some arbitrators will resolve the dispute on the theory that the agreement should be deemed to include all applicable law. Others will refuse to do so.[28]

No matter which way the arbitrator resolves this question, however, it remains clear that in an action to enforce or set aside his award, a court should set it aside if it concludes that the remedy the arbitrator has ordered for the agreement violation would contravene a valid law or regulation. See *Evans Products Co. v. Millmen's Union No. 550*, 159 Cal.App.3d 815, 205 Cal.Rptr. 731 (1984) refusing enforcement of *Evans Products, Co.*, 70 LA 526 (D. Feller, 1978). Sometimes courts have referred to the role of the courts in such cases in terms of "public policy." Most of the decisions refusing to enforce, or vacating, arbitrators' awards, however, were not discharge cases but involved awards which required affirmative action in violation of statutory limitations.[29] But even an award

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[28] The proper course of action for an arbitrator in such a situation has been the subject of much controversy at the meetings of the National Academy and has been termed the Meltzer-Howlett controversy. The controversy and the arbitration decisions in which there was a conflict between external law and the agreement are reviewed in Feller, *The Impact of External Law*, in The Future of Labor Arbitration in America 83, 90 ff. (1976).

[29] See, e.g., *General Warehousemen v. Standard Brands*, 579 F.2d 1282 (5th Cir., 1978), *cert. den.*, 441 U.S. 957 (1979) (award required employer to give to employees displaced from one plant

of reinstatement under a "just cause" provision cannot stand if there is a statutory bar to employment, as in *American Postal Workers v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982) (re-employment of one who strikes against the government prohibited by 5 U.S.C. § 7311). Except in such cases an award finding a lack of just cause for discharge should not be set aside on public policy grounds.

This is particularly clear where the public policy invoked is safety. This issue has already been decided by this Court although in the converse situation: where it is the union that relies on the safety issue to avoid compliance with an arbitral determination.

In *Gateway Coal Co. v. United Mineworkers*, 414 U.S. 368 (1974), the issue was whether a strike by miners during the term of an agreement to protest alleged unsafe conditions could be enjoined. The district court had enjoined the strike and ordered immediate arbitration of the miners' safety complaint. The arbitrator decided that their claim of hazard was without merit. As the case came to the Court of Appeals for the Third Circuit the issue was whether the injunction should be continued

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superseniority at another plant where a different union was the certified bargaining agent, in violation of the National Labor Relations Act); *Botany Industries v. N.Y. Joint Board*, 375 F.Supp. 485 (S.D.N.Y. 1974) (award required employer to violate Section 8(e) of the National Labor Relations Act).

A court may properly set aside an award in the converse case—where the contract, as the arbitrator reads it, requires employees to violate the law. Thus, in *Teamsters Local 249 v. Consolidated Freightways*, 464 F.Supp. 2699 (W.D.Pa. 1979), the collective agreement as read by a joint management-union committee required truck drivers to obey orders to drive trucks in violation of the Pennsylvania Motor Vehicle Code. The District Court quite properly set aside the committee decision, which it termed an "arbitration" award.

after the arbitator had so ruled. That court ordered vacation of the injunction against the strike, saying:

> "Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. Men are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be. The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment." *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1160 (3d Cir. 1972).

This Court reversed, quoting extensively from *Warrior & Gulf* to the effect that the labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment. The Court concluded:

> "We think these remarks are as applicable to labor disputes touching the safety of the employees as to other varieties of disagreement. . . . The Court of Appeals majority feared that an arbitrator might be too grudging in his appreciation of the workers' interest in their own safety. We see little justification for the Court's assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust." 368 U.S. at 379.

These considerations are equally applicable where it is the employer rather than the union that resists the arbitrator's conclusion on the basis of the public's interest in safety.

In every case involving an arbitration award ordering reinstatement, as in this case, or enjoining a strike over safety issues, as in *Gateway Coal*, the party seeking to avoid the arbitrator's decision is not acting as a disinterested representative of the public. Public policy is being invoked in the private interest of the party in an effort to avoid the binding effect of a decision adverse to it on the safety issue. Whether the private party be the union or the employer, it should be bound by the arbitrator's decision if it has been stipulated that his decision shall be final and binding, as it has been in this case and in *Gateway Coal.*

That principle should apply not only where the public policy urged as the ground for vacating an arbitrator's decision is safety but in any case in which the arbitrator is given the authority to determine whether there is "just cause" for discharge. By vesting in the arbitrator the power to determine the justice of the discipline, and the appropriate remedy where justice requires it, the parties have delegated to the arbitrator the authority to determine the weight to be given to public policy, and the principles of *Enterprise Wheel & Car* require that the courts respect his determination.

In so urging we do not necessarily agree in full with the broad principle set forth in Judge Easterbrook's concurring opinion in *E.I. DuPont Co. v. Grasselli Employees Association*, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3235 Oct., 1986). Judge Easterbrook there argued that only where a collective agreement, as read by the arbitrator, "violates a rule of law" may a court set it aside on public grounds. We need not go that far. That rule is appropriate where the arbitrator has been given authority to determine whether the punishment imposed by the employer for violating a rule is just. It may be but is not necessarily appropriate where the issue is whether the rule itself is contrary to public policy.

As we have earlier stated, an arbitrator has no authority to set aside the agreement under which he serves as contrary to public policy. His river of authority can rise no higher than its source, the collective bargaining agreement. A court may perhaps, in carefully limited cases, determine that the rule of employee conduct prescribed by the agreement is unenforceable as against public policy even though not contrary to law.[30] We offer no principle to govern such cases other than the one already enunciated by this Court in *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983): the public policy "must be well defined and dominant, and is to be ascertained by 'reference to the laws and legal precedents and not from general considerations of supposed public interests. *Muschany v. United States*, 324 U.S. 49, 66 (1945).'" But where, as here, the question is whether an order of reinstatement based on a finding that there was not just cause for discharge should be enforced, the stricter rule urged by Judge Easterbrook is the only tolerable one.

Any other rule would lead to the possibility of results such as that reached by the Supreme Court of California in *Black v. Cutter Laboratories*, 43 Cal.2d 788 (1955), *cert. dismissed*, 352 U.S. 859 (1956). That court refused enforcement of a "just cause" order of reinstatement on what it regarded as strong public policy grounds: Com-

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[30] A case in point is *Meat Cutters Local No. P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982). The agreement there authorized the employer to promulgate a rule prohibiting employees in a meat packing plant from reporting directly to the United States Department of Agriculture inspectors. The union's challenge of the rule was rejected in arbitration. The Court of Appeals set the award aside on the ground that it violated the public policy expressed in the Meat Inspection Act, 21 U.S.C. §§ 602ff. The question in the case was not whether discipline imposed for violation of the rule was just. (In fact the only discipline was a reprimand which was later revoked by agreement.) The issue was the validity of the rule itself.

munist party membership. This Court refused to review that decision but that was before it had developed the present overriding federal policy requiring the opposite result, a subject to which we now turn.[31]

V. Federal Labor Policy Requires a Strong Re-Affirmation of the Rule of *Enterprise Wheel & Car* and the Rejection of an Expansive Public Policy Exception.

Any rule other than the one we urge with respect to the enforcement of awards would itself be contrary to the dominant federal policy supporting labor arbitration. That policy is based upon reliance on arbitration to foster industrial peace. This Court's decisions, not only in the Steelworkers Trilogy, but also in *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), and *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), rest on a sound understanding of the collective bargaining process and a clear vision of the role of arbitration in making that process effective.

As the Court observed in *Warrior & Gulf*, grievance arbitration is not a substitute for litigation but a substitute for the strike as a method of resolving disputes arising during the term of a collective bargaining agreement: "Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement be-

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[31] It is somewhat curious that a potential public policy defense existed in the only other case in this Court in which enforcement of an order of reinstatement under a "just cause" provision was contested, *Enterprise Wheel & Car*. In that case reinstatement had been ordered, with some loss of pay, for employees who had engaged in a strike over an arbitrable grievance in violation of contract. The public policy against such activity is certainly a strong and well defined one based on statute, but no suggestion was made that the award was therefore unenforceable.

ing the 'quid pro quo' for the agreement not to strike." [32] That policy has been implemented not only by ordering arbitration when the parties have agreed to it and by enforcing arbitration awards. The Court has also acted to protect the employer's interest in peaceful resolution of disputes over interpretation and application of the agreement.

Thus in *Teamsters Local 174 v. Lucas Flower Co.*, it was held that a no-strike clause must be implied from a union's promise to arbitrate. When the Court became persuaded that the employer was inadequately protected by a damage action for union breach of a no-strike clause or by the self-help remedy of discharge of striking employees, it overrode the Norris-LaGuardia Act prohibition of federal court injunctions against strikers, authorizing federal district courts to enjoin breach of contract strikes over arbitrable grievances (*Boys Markets v. Retail Clerks*; see also *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), and *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974), in which a promise not to strike was implied from a commitment to arbitrate, following *Lucas Flour*, and the implied promise was held to justify an anti-strike injunction, following *Boys Markets*). Given an agreement to arbitrate, those decisions compel the union to arbitrate and preclude strike. The union that has gained the employer's commitment to arbitration in exchange for a no-strike pledge is not to be permitted the *de facto* power to rewrite the bargain unilaterally and strike or arbitrate at its option.

Nor is the individual employee or the union permitted to bypass the grievance and arbitration procedure in order to gain the ear of a more sympathetic judge or jury, or more expansive relief than is usually available in arbitration. Except where the union breaches its duty

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[32] 363 U.S. at 578, n.4.

of fair representation, *Vaca v. Sipes*, 386 U.S. 171 (1967), the employee is confined to the forum and to the remedies provided by the collective bargaining agreement. *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965).

The rule announced in *Enterprise Wheel and Car* is an essential part of this carefully built structure. The rule of that case, that whatever its own view of the merits, a court must enforce an arbitrator's resolution of a dispute as to the proper application of a contract, is not one that is naturally congenial to judges accustomed to exercising the ultimate power to decide what agreements mean and what consequences should follow from their breach. The temptation to correct what a court believes to be a clearly erroneous result is a strong one, particularly where, as here, the decision is made by one not skilled in the law. And so some courts, although paying lip service to the principles of *Enterprise Wheel and Car*, as the court below did, resort to other doctrines in order to make what they believe to be the required correction. Sometimes the doctrine invoked is that the arbitrator exceeded his jurisdiction because plainly wrong.[23] In other cases, as in this case, the theory is that the arbitrator's decision is contrary to public policy. In either case the result is to substantially undercut the federal policy designed to encourage the use of arbitration rather than the strike as a method of resolving disputes during the term of an agreement.

It is significant that in almost every case in which arbitration is provided as a substitute for the strike the parties stipulate that the arbitrator's award shall be final and binding. Advisory arbitration is virtually unknown in private industrial relations. What the parties seek in

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[23] The principal cases are reviewed in Morris, *Twenty Years of Trilogy: A Celebration*, in Decisional Thinking of Arbitrators and Judges, Proceedings of Thirty-Third Annual Meeting, National Academy of Arbitrators 331, 351ff (1981).

arbitration is speed, flexibility and *finality*. The advantages of arbitration over the more traditional method of settling disputes by a work stoppage is substantially lessened if, at the end of the arbitration process, litigation must be undertaken in order to achieve the result mandated by the arbitrator. The danger is not only that, as in this case, one party or another may succeed in upsetting the arbitrator's decision. The danger is that such cases will serve as beacons inviting the parties in other cases to resist compliance with arbitrators' decisions in the hope that they too can succeed in like manner, or at least achieve substantial delay.

The number of cases in which arbitrators' awards have been set aside on public policy or other grounds is not large. But the number of cases in which it has been necessary to institute litigation to enforce arbitrators' awards or in which suit has been brought to set them aside is quite large and growing.[34] It is therefore critically important for the maintenance of the structure of law which this Court has created that the limitations on the power of a court to set aside or refuse to enforce an arbitrator's award be again set out in strong terms so that the temptation to go to court after the arbitration process has been concluded will be substantially reduced.

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[34] In the five year period 1981-1985, there were more than 50 reported federal circuit court of appeals decisions in which the validity of an arbitrator's award was contested. In only a very few was the contest successful. See 2 Bureau of National Affairs, Labor Relations Cumulative Digest and Index 1981-1985 (1986) 2549-2571. The number of district court cases, most of which are unreported, is obviously several times greater. A similar digest of appellate decisions covering a ten-year earlier period reports less than a third of the number reported for 1981-1985. 2 Bureau of National Affairs, Labor Relations Cumulative Digest and Index 1971-1975 (1976) 1659-1667.

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be reversed and the cause remanded with directions to enforce the arbitrator's award.

Respectfully submitted,

DAVID E. FELLER *
Special Counsel
Boalt Hall
Bancroft at Piedmont
Berkeley, CA 94720
(415) 642-0629

WILLIAM P. MURPHY
President, National Academy
of Arbitrators
School of Law
University of North Carolina
Chapel Hill, North Carolina 27514
(919) 962-4124

Attorneys for the
National Academy of Arbitrators

Of Counsel:

JAN VETTER
Boalt Hall
Berkeley, CA 94720
(415) 642-0821

* Counsel of Record